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CONFLICT OF LAW RELATING TO NEGOTIABLE PAPER, TAKEN AS COLLATERAL SECURITY FOR ANTECEDENT INDEBTEDNESS.

At the present time, were we without some general rules of right and regulation, recognized by the civilized nations of the earth to govern their intercourse with their own States and with each other, the most serious complications and difficulties might, and of necessity would, arise. Commerce being now universal among all civilized nations, the inhabitants of all having free intercourse with each other, contracts, sales, marriages, etc., are so common among persons whose domiciles are in different States and in different countries, having different and even opposite laws on the same subjects, that, without some common principles adopted by all nations in regard to such matters, there would be utter confusion of all rights and remedies; and mighty differences would grow up to weaken our domestic and foreign relations, which would tend to destroy the obligation of contracts, and to render our property insecure.

Commercial law is a system of jurisprudence which all nations engaged in commerce must necessarily recognize; and upon no subject is it of greater importance that there should be, as far as it is possible, uniformity of decision throughout the world. And most especially is this desirable in the several States of the Union; so that a merchant in one State entering into any transaction with a merchant of another State, which is valid at law in his own State, may be sure that, if the question comes to be considered in a court of a sister State, it

will be decided in the same manner as in his own. Suppose that a contract, valid by the laws of the State in which it is made, is sought to be enforced in another State or country where such a transaction is prohibited; or, on the other hand, suppose a contract invalid by the laws of the country where it is made, but valid in the country in which it is sought to be enforced. Now it is evident that unless some rules which shall be uniform are adopted to regulate such cases as these, manifest injustice must arise, in the settling of differences between citizens of different countries, in relation to such contracts.

Questions of this kind must occur frequently, not only in countries which have no dependence upon each other, but also in those States which are bound together by one great instrument to whose supremacy they all must bow, while at the same time, in many respects, independent States and subject only to their own laws. This, of course, must create complications between the citizens of those States.

This is particularly true in relation to those securities known as commercial paper.

Bills of exchange and promissory notes are commercial paper in the strictest sense, and of course must be regarded as favored instruments, not only because of their negotiable qualities, but also because of their universal use and convenience in mercantile affairs. Everywhere the rule is that they may be transferred by indorsement; or, where indorsed in blank, or made payable to bearer, they are transferable by mere delivery. Regulations between nations encourage their use as a safe and convenient medium for the settlement of balances between mercantile men of different countries; and any course of judicial decision which would tend to restrain or impede their free and unobstructed circulation for the purpose of foreign or domestic trade would be opposed to the needs of business transactions. It is, therefore, of importance that the greatest possible freedom should be given to the use and circulation of negotiable paper.

The general rule with respect to negotiable paper is, that one who takes it for a valuable consideration, without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent

parties, the transaction may be without any legal validity. "This is a doctrine," says Mr. Justice Story, "so long and so "well established, and so essential to the security of negotiable "paper, that it is laid up among the fundamentals of the law, "and requires no authority or reasoning to be now brought "about in its support." Neither is the holder of any negotiable paper, before it is due, bound to prove that he is a *bona-fide* holder for a valuable consideration, without notice; for the law will presume that, in the absence of all rebutting proofs, and it is incumbent on the defendant, by way of defence, to satisfactorily prove the contrary, and thus overthrow the *prima-facie* title of the plaintiff.[1]

Indorsers of negotiable securities enjoyed the protection of the former rule for ages before any successful attempt was made to qualify it, unless it should appear that the consideration was illegal, or that the instrument itself was fraudulent in its inception, or that it had been lost or stolen before it came to the possession of the holder.[2]

Throughout the whole line of these decisions it seems that it was well understood that the title of a *bona-fide* holder was not affected by any equities between the antecedent parties. But it was subsequently decided that if the indorser had no valid title to the instrument, and that such facts were known to the transferee as ought to put any prudent man on his inquiry as to whether the transferrer had a right to use the paper for his own benefit, then the holder, as against the maker, was not entitled to recover.[3] This ruling was followed for a short time, but never satisfactorily, and was afterward overruled by the tribunal from whence it had arisen.[4]

"Nothing short of fraud, not even gross negligence," says

[1] *Goodman* v. *Simonds*, 20 Howard 343; *Berry* v. *Alderman*, 24 Eng. L. & E. 318; Bayley on Bills, ch. 12, p. 529 to 531; *Arbourn* v. *Anderson*, 1 A. & E. r. s. 498. In this last case Lord Denman said: "The "owner of a bill is entitled to recover upon it if he came to it honestly; "that fact is implied, *prima facie*, by possession; and to meet the in- "quiry so raised, fraud, felony, or some such matter must be proved."

[2] Hinton's Case, 2 Show 235; Anon. 1 Salkeld, 126; *Miller* v. *Race*, 1 Burr 452; *Grant* v. *Vaughan*, 3 Burr 1516; *Peacock* v. *Rhodes*, 2 Douglas 633; *Lawson* v. *Weston*, 4 Esp. 56.

[3] *Gill* v. *Cubitt*, 3 B. & C. 466.

[4] *Goodman* v. *Harvey*, 4 A. & E. 870; *Aubourn* v. *Anderson*, 1 A. & E. r. s. 498.

Mr. Justice Story, "if unattended with *mala fides* on the part "of the taker of the instrument, will invalidate his title so as "to prevent him recovering the amount."[1] "Every person," says the same learned author, "is treated in the sense of the "rule as a *bona-fide* holder for value, not only one who has ad- "vanced money or other value for it, but one who has received it "in payment of a precedent debt, or has a lien upon it, or has "taken it as collateral security for a precedent debt, or for "future as well as past advances."

During the period that the rule laid in down in *Gill* v. *Cubitt* seems to have been considered good law, it will be seen that some of our State Courts accepted the rule, and the evil effects resulting from these decisions still continue in some of the recent State decisions, as will be seen by an examination of cases in the Courts of New York and some other States.

Whether a previous debt is sufficient consideration to constitute a holding for value of commercial paper, is a question upon which there has been a great conflict of authority in this country since the case of *Coddington* v. *Bay*, decided by Chancellor Kent in New York in 1821.[2] This decision introduced an exception in the general rule of law in respect to negotiable instruments, that one who has taken such paper before maturity, and in the usual course of business, for a valuable consideration, is a *bona-fide* holder and is protected against equities between the antecedent parties, of which he had no notice. The great authority of Chancellor Kent, who rendered in this case the opinion which has paved the way for establishing this new doctrine, has served to obtain its recognition in about half of the States of the Union in which the point has arisen and been decided, notwithstanding that the high authority of the Supreme Court of the United States has uniformly been against it.

Upon a question which is of such vast importance to the commercial world, it is surprising that such conflict of authority should exist; for upon a question of commercial law it is most especially desirable that we should have a uniform line of decisions.

The law respecting negotiable instruments was declared by Lord Mansfield, in the language of Cicero, in *Luke* v. *Lyde*,[3]

[1] Story on Promissory Notes, 7th Ed., Sec. 232.

[2] 5 John's Chancery 54, affirmed in 20 Johnson 637.

[3] 2 Burr Rp. 883.

to be, in a great measure, not the law of a single country only, but of the commercial world: "Non erit alia lex Roma, alia "Athenis, alia nunc, alia post hoc, sed et apud omnes gentes, et "omni tempore, una eademque lex obtenebit."

And as the inhabitants of the different States of the Union are constantly engaged with each other in transactions in which commercial paper is used, it is all the more surprising that this difference of opinion should exist. As Judge Moncure remarked in *Davis* v. *Miller*,[1] "There is, perhaps, no question con- "nected with the commercial law which is of more importance, "and upon which, at the same time, there is more distressing "conflict of authority."

Before proceeding to discuss the question as to whether the transfer of negotiable paper as collateral security for antecedent debts is a consideration sufficient to protect the holder, in the absence of fraud or notice, against prior equities existing between the maker and the payee or indorser, it may be well to thoroughly understand what is meant by a *valuable consideration.*

In Comyn's Digest, Actions on the Case, Assumpsit B., page 1–15, it is stated that a valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other. Mr. Story, in his work on Contracts, distinguishes between a good and a valuable consideration. "A good consideration," he says, "is an equitable consideration, founded "upon mere love, affection or gratitude, which, although it will "support the contract as between the parties when executed, "will not support an action to enforce an executory contract.

"But a valuable consideration is a legal consideration eman- "ating from some injury or inconvenience to the one party, or "some benefit to the other."[2]

Chitty says: "Valuable considerations are those which "confer some benefit upon the party by whom the promise "is made, or upon a third party at his instance or request, or "some deteriment sustained at the instance of the party promis- "ing by the party in whose favor the promise is made."

Thus it will be seen that a valuable consideration exists

[1] 14 Gratton (Va.) 14.

[2] Story on Contracts, Vol. 1, p. 502.

within the meaning of the law, when the one party has sustained any detriment, or altered his position in any way for the worse, or where the other party has gained some leniency or forbearance at the instance of the other.

Soon after the decision of Chancellor Kent in *Coddington* v. *Bay*[1] in New York, the case of *Swift* v. *Tyson*[2] came before the Supreme Court of the United States for decision. The facts of the case were substantially these: A bill of exchange had been accepted in New York, and this suit was instituted by the holder, a citizen of Maine. The acceptance and indorsement of the bill were admitted, and the defence rested on the allegation that the bill had been received in payment of a pre-existing debt, and that the acceptance had been given for lands which the acceptor had purchased from the drawer of the bill, to which lands the drawer had no title. The bill accepted had been received in good faith and before maturity. There being a divided Court as to the question in the Circuit Court of New York, the case was certified to the Judges of the Supreme Court of the United States. The case was argued with great ability by counsel, and the judgment of the Court was delivered by Mr. Justice Story. I do not think I can do better than quote a portion of his judgment. "We have no hesitation," he says, "in saying that a pre-existing debt does constitute a "valuable consideration in the sense of the general rule already "stated as applicable to negotiable instruments. Assuming it "to be true (which, however, may well admit of some general- "ity of the language) that the holder of a negotiable instrument "is unaffected with the equities between the antecedents parties, "of which he had no notice, only where he receives it in the "usual course of trade and business for a valuable consideration, "before it becomes due, we are prepared to say, that receiving "it in the payment of, or as security for, a pre-existing debt is "according to the known usual course of trade and business. "And why upon principle should not a pre-existing debt be "deemed such a valuable consideration? It is for the benefit "and convenience of the commercial world to give as wide an "extent as practicable to the credit and circulation of negotiable "paper, that it may pass not only as security for new purchases "and advances made upon the transfer thereof, but also in

[1] 5 John's Chan. 54.
[2] 16 Peters 1.

"payment of, and as security for, pre-existing debts. The "creditor is thereby enabled to realize or to secure his debt, "and thus may safely give a prolonged credit, or forbear from "taking any legal steps to enforce his rights. The debtor also "has the advantage of making his negotiable securities equiva- "lent to cash. But establish the opposite conclusion, that "negotiable paper cannot be applied in payment of, or as security "for, pre-existing debts, without letting in all the equities "between the original and antecedent parties, and the value "and circulation of such securities must be essentially dimin- "ished and the debtor driven to the embarrassment of making a "sale thereof often at a ruinous discount to some third person, "and then, by circuity, to apply the proceeds to the payment of "his debts. What, indeed, upon such a doctrine, would "become of that large class of cases where new notes are given "by the same or by other parties, by way of renewal or "security to banks in lieu or old securities discounted by them, "which have arrived at maturity?"

This case, which has served as a guide ever since for the Supreme Court of the United States, and those States which follow its ruling, was the first case of the kind of any importance that came before the Supreme Court; and in his opinion, Mr. Justice Story goes over the whole question very ably, and reviews the authorities in New York with great ability.

The question had been before the Supreme Court prior to the case of *Swift* v. *Tyson*, and it was decided that it makes no difference whatsoever, as to the rights of the holder, whether the debt for which the negotiable instrument is transferred to him is a pre-existing debt, or is contracted at the time of transfer. In each case, it was said, he equally gives credit to the instrument.[1]

Mr. Justice Catron dissented from the opinion of Mr. Justice Story in *Swift* v. *Tyson;* but his brief dissent was wholly upon that ground which renders it quite certain that the whole Court was aware of the extent to which the opinion of the Court carried the doctrine of the commercial law upon the subject of negotiable instruments, transferred or delivered as security for antecedent indebtedness.

Mr. Justice Catron said, in his dissenting opinion: "I never

[1] *Coolidge* v. *Payson*, 2 Wheaton 66–73; *Taconsley* v. *Sumrall*, 2 Peters 170–182.

"heard this question spoken of as belonging to the case, until "the principal opinion was presented last evening, and there- "fore I am not prepared to give any opinion, even if it was called "for by the record."

Many Judges in those States holding the opposite rule refer to the note in the case of *Swift* v. *Tyson* as being taken in payment and not as collateral security merely, and that therefore what was said by Mr. Justice Story was mere dicta; but I think the language of Mr. Justice Story may be regarded as having received the assent of the whole Court, with the exception of Mr. Justice Catron. And afterward, in his work on Promissory Notes, Judge Story reiterated and supported the doctrine laid down in *Swift* v. *Tyson*.[1]

The question next came up in the Supreme Court, in the case of *Goodman* v. *Simonds*.[2] In this case there was a settlement of antecedent indebtedness, the surrender of securities, and making of new notes, the payment of the latter being secured by a bill of exchange. The Court, however, decided the question upon the ground that there was a full present consideration, and said that the question as to whether a transfer of negotiable securites as collateral security for a pre-existing debt, without more, would make the pledgee a holder for value in the usual course of business, did not arise, and was, therefore, not necessary for decision, inasmuch as, at the time the settlement was made, the new notes were given in payment of the prior indebtedness, and the collaterals previously held were surrendered to the defendant, and the time of payment was extended and definitely fixed by the terms of the notes, showing, conclusively, an agreement to give time for the payment of the already overdue debt, and a forbearance to enforce remedies for its recovery, which has, of itself, always been considered a sufficient and valuable consideration.[3] But by a reading of the opinion it will be seen that the doctrine laid down in *Swift* v. *Tyson* was undoubtedly regarded as the law by the Court. And in *McCarty* v. *Roots*,[4] which came up shortly after the case of *Goodman* v. *Simonds* was decided, the question

[1] See Story on Prom. Notes, p. 215, note 1.

[2] 20 Howard 243.

[3] See Story on Prom. Notes, sec. 186; *Morton* v. *Brom*, 7 Ad. & Ellis 19; *Wheeler* v. *Slocum*, 16 Pick. 62.

[4] 21 Howard 432.

was squarely presented. Suit was brought by a pledgee holding an accommodation bill of exchange against the indorser. The bill was held by the pledgee as collateral security for an antecedent indebtedness, without further consideration. The Court held (McLean, Justice) that the fact that the bills were indorsed as stated did not impair the plantiff's right to recover, and that such an indorsement was a valid transaction within the usual course of business.

In *Oates* v. *National Bank*[1] an extension of time for the payment of an antecedent debt was granted, which, as before stated, was of itself a sufficient consideration to constitute a holder for value in the usual course of business. Nevertheless Mr. Justice Harlan states it as settled law, that one who receives negotiable paper as collateral security for an antecedent debt, without notice of any facts which impeach its validity as between the original parties, is a *bona-fide* holder, and, as such, protected against equities existing between the original parties.

One of the latest cases, and probably the one best illustrating this doctrine in the Supreme Court of the United States, is the case of *Railroad Co.* v. *National Bank.*[2] This case finally settled the question as far as that Court is concerned. The railroad company executed its promissory note to the order of its treasurer. It was made for the purpose of raising money thereon for the company; it was indorsed in blank, first by the treasurer and then by Palmer & Co.; neither the treasurer nor Palmer & Co. receiving any consideration for their indorsement.

The note was placed with a firm on Wall Street for negotiation and sale. It was pledged by them afterward to the Bank as collateral to secure a debt then owing by them to the Bank.

This case had been decided in favor of the Bank in the Circuit Court of New York, and was appealed by the railroad company to the Supreme Court of the United States, and was there affirmed with very emphatic opinions by Justices Harlan and Clifford. Both elaborately consider the question, and anyone reading their opinions must admit that the position they hold is in all respects based upon the soundest principles. Mr. Justice Harlan says, in summing up the authorities: "Our conclusion, therefore, is, that the transfer

[1] 100 U. S. 249.
[2] 102 U. S. 16.

"before maturity of negotiable paper is security for an "antecedent debt merely, without other circumstances, if "the paper be so indorsed that the holder becomes a party "to the instrument, although there is no express agree- "ment by the creditor for indulgence, is not an improper "use of such paper, and is as much in the usual course of "business as its transfer in payment of such debt. In either "case the *bona-fide* holder is unaffected by equities or de- "fences between prior parties of which he had no notice. This "conclusion is abundantly sustained by authority. A differ- "ent determination by this Court would, we apprehend, "greatly surprise both the legal profession and the commercial "world."

Numerous other cases might be cited to bear out this doctrine of the Supreme Court of the United States; but I think that this case has settled the question so emphatically in that tribunal that it is unnecessary to mention any others.

The English Courts are unanimous in holding that current negotiable paper, taken as collateral security for a prior debt, is received in the usual course of business.[1] Lord Campbell, in giving his opinion in *Poirer* v. *Morris*,[2] remarked: "There is nothing to "make a difference between this and the common "case, where a bill is taken as security for a debt, and in that "case an antecedent debt is a sufficient consideration." The doctrine is affirmed in an opinion in the same case by Judge Crompton: "Whether the bill was a collateral security, or "whether it had the effect of suspending the payment of the "antecedent debt, is quite immaterial; the plaintiffs have a "perfect right to keep the bill."

And so in *Currie* v. *Misa*[3] it was held that the title of a creditor to a negotiable security given to him on account of a pre-existing debt, and received by him *bona fide*, and without notice of any infirmity of title on the part of the debtor, is indefeasible, whether that security be payable at a future time or on demand. Judge Lush here adopted the view that taking

[1] *Poirer* v. *Morris*, 2 Ellis & Blackburn 89, on appeal; 20 L. & E. 103; *Percival* v. *Frampton*, 2 Cromp. M. & R.; *Bosauquet* v. *Dudman*, 1 Starkie 1; *Heywood* v. *Watson*, 4 Bingham 496; *Price* v. *Misa*, 16 M. & W. 232; *Currie* v. *Misa*, L. R. 10 Ex. 153; *Pillaus* v. *Van Mierop*, 3 Burrows, 1664; *ex parte* Bloxham, 8 Vesey, 531.

[2] *Supra.*

[3] L. R., 10 Exchequer 153.

collateral security for a pre-existing debt is a conditional payment of the debt. He says: "The true reason is that given "by the Court of Common Pleas in *Belshaw* v. *Bush*[1] as the "foundation of the judgment in that case, namely: that a "negotiable security given for such a purpose is a conditional "payment of the debt, the condition being that the debt "revives if the security is not realized." Lord Coleridge dissented from the opinion of the Court, as delivered by Judge Lush, in an opinion in which he adopts the reasoning of Chancellor Kent in *Coddington* v. *Bay*.[2] So also in *Percival* v. *Frampton*,[3] where the note was accommodation paper executed to enable the maker to obtain advances upon it, the Court held that the holder of the note, as collateral security for an antecedent debt, held it free from the equities existing between the maker and the indorser, Baron Parke saying "that if the note was given to the plaintiffs as a security for a "previous debt, and they held it as such, they may properly "be stated to be holders for valuable consideration."

So, where a person has an account with his banker, and the banker's acceptances exceed the cash balance in his hands, it is held that he holds collateral securities in his possession for value.[4] And if one place bills indorsed in blank with his banker for collection when due, and the banker transfer the bills as collateral security to another for a debt of his own, trover cannot be maintained.[5]

The English House of Lords has applied the rule to checks drawn upon a bank as being equally applicable to those which were payable on demand as to those payable at a future time.[6] The rule, that the holder of negotiable paper received as collateral security from an antecedent debt is a holder for value, is upheld also in the Canadian Courts:[7] where one received such paper charged with the duty of presentment, and to give notice of non-payment, if necessary, if default is made,

[1] 11 Common Bench 191.
[2] 5 John's Chan. 54.
[3] 2 Crompton, Messon & Pocoe 182.
[4] *Bosauquet* v. *Dudman*, 1 Starkie 1; *Heywood* v. *Watson*, 4 Bing. 496.
[5] *Collins* v. *Martin*, 1 B. & P. 648.
[6] *Currie* v. *Misa*, L. R., 10 Exchequer 153.
[7] *Peacock* v. *Purcell*, 14 C. B. n. s. 728; *Heywood* v. *Watson*, 1 M. & P. 268, on appeal, 4 Bing. 496.

he is charged with the amount of such securities, as the loss is occasioned by his own neglect.[1] "The law is clear," said Lord Kenyon, in *Steelman* v. *Grich*,[2] "that if in payment of a debt "the creditor is content to take a bill or note payable at a "future day, he cannot legally commence an action for his "original debt, until such note or bill becomes payable and "default is made in the payment." And the cases all agree that no recovery can be had in any case, upon the original debt, where the collateral given in security was indorsed while current and is still outstanding.[3] In all cases where a party accepts collaterals as security for a previous debt already due, there is no implied agreement not to negotiate the collaterals before maturity; and this is frequently done among business men for the purpose of raising money which ought to have been paid when the debt matured; so that the collateral may be said to be always in the interest of the debtor and for his ease, and collateral securities are not ordinarily received as a mere pledge for the debt so as to make the creditor guilty of a breach of faith if he negotiates them. All that seems to to be implied by its being collateral is that there is no implication or agreement that the original debt is extinguished. The new securities are collateral to the previous debt, running along with it, as it were, and the creditor is entitled to hold to his original debt and all the securities. Simply by the fact of its being collateral to the prior debt, it is not affected differently, as between the original parties, than if it were taken in absolute payment of the debt. It is negotiable in the completest sense, and is not restricted as to its further negotiation unless by special agreement.

Thus it will be seen that there is but one rule upon the subject that comes to us from the mother country, in which all the Courts seem to agree, and that is that a holder of such negotiable paper before maturity, as collateral to a pre-existing debt, is unaffected by any antecedent equities of which he had no notice.

Now, having shown that the decisions of the Federal Courts of the United States and the Courts of Great Britain are united upon the question, when we come to consider the

[1] *Bank* v. *Chambers*, 11 Rich. 657.
[2] 1 Esp. Reports 4.
[3] *Price* v. *Price*, 16 M. & W. 232–243.

question in the Courts of the several States of the Union, we do not meet with that harmonious line of decision which we have seen characterizes the Courts of the United States and of England. On the contrary, we find the greatest confusion and difference of opinion, by eminent jurists who have presided over our State tribunals, some Courts adhering to the doctrine laid down by Mr. Justice Story, and others still clinging to the ruling of Chancellor Kent. The evil results of this difference of opinion in our own State Courts will be further evident from the fact that the Supreme Court of the United States is not bound by the decisions of the State Courts on questions of general commercial law, and therefore on appeal of a case from a State holding to the doctrine of Chancellor Kent, the case would, of course, be reversed.

It was contended in *Swift* v. *Tyson* that, as the law in New York State was settled, the Supreme Court of the United States must follow the decisions of the State tribunals in all cases to which the 34th section of the Judiciary Act of 1789, chapter 20, applied. That section provides: "That the laws "of the several States, except where the Constitution, treaties, "or statutes of the United States shall otherwise require or "provide, shall be regarded as rules of decision in trials at "common law in the Courts of the United States, in cases "where they apply." But in delivering the judgment in that case, Mr. Justice Story says in connection with this point: "And we have not the slightest difficulty in holding that this "section, upon its true intendment and construction, is strictly "limited to local statutes and local usages of the character "before stated, and does not extend to contracts and other "instruments of a commercial nature, and the true interpre- "tation and effect whereof are to be sought, not in the "decisions of local tribunals, but in the general principles of "commercial jurisprudence."

And so in *Oates* v. *National Bank*[1] and in the *Railroad Company* v. *National Bank*[2] and in numerous cases in which it has been contended that the Supreme Court must follow the decisions in certain cases, it has uniformly been held that upon questions of general commercial law they are not bound

[1] 100 U. S. 239.
[2] 102 U. S. 42.

by State decisions.[1] And from this state of affairs it will be seen that all that is necessary for a suitor who has had his cause decided against him in a Court holding to the ruling of Chancellor Kent is to appeal to the Supreme Court of the United States if the case is one over which that Court has jurisdiction, and he is certain to obtain a reversal, if there are no peculiar circumstances.

In some American cases a distinction is made between taking a note in payment and one taken merely as collateral security for an antecedent debt,[2] though it may be considered as settled in all our State Courts, except in those of New York, that, where a negotiable instrument is taken in payment of a pre-existing debt, the holder is freed from equities existing between prior parties. This doctrine seems to have, for a time, been doubted and denied by the Courts of some of the States; but it is now generally accepted by most of the States as being the law.[3]

The Courts of New York seem to deny all distinction between taking negotiable paper in payment of an antecedent debt and simply taking it as a security for the payment of such debt.[4] And in this I think they are consistent. The transactions are, of course, different in form, but the ordinary cases of taking securities as payment, or as collateral to the prior debt, are, it seems to me, the same in principle and have the same effect. One whose debt is due is considered by the commercial world a bankrupt, if he does not pay it at once; but if, instead of money, he gives a bill of exchange, or a note or other negotiable paper, either on time or at sight, whether this is in the form of payment or as collateral security, he in either case gains time, and thus, it may be, saves himself the disgrace and ruin of a bankrupt.

[1] *Carpenter* v. *Insurance Co.*, 16 Peters 469; *Watson* v. *Turpley*, 18 Howard 517.

[2] See decisions in Pennsylvania and other States, hereafter cited.

[3] See *Bank of Covington* v. *Republic*, 5 Rhode Island 520, and cases there cited.

[4] *Swain* v. *Treadway*, 53 N. Y. 650; *Lawrence* v. *Clark*, 36 N. Y. 128; *Weaber* v. *Burden*, 49 N. Y. 286; *Fisher* v. *Sharpe*, 5 Daly 214; *Ayer* v. *Lypolds*, 6 Daly 91; *Buhrman* v. *Baylis*, 14 Hun. 608; *Rosa* v. *Brotherton*, 10 Wend. 85; *Payne* v. *Cutter*, 13 Wend. 605; *Stalker* v. *McDonald* 6 Hill 93; *White* v. *Bank*, 1 Barb. 235. Same case on appeal, 3 Sand. 222.

The case of *Coddington* v. *Bay*,[1] which was the first of any consequence in New York, arose in this manner: Bay, the plaintiff, owned a vessel; he employed R. & S., who were ship-carpenters, to sell her on credit, taking good notes in payment, and remit to them; R. & S. did sell the vessel and took the notes of the purchaser, indorsed by another firm; R. & S. delivered the notes so indorsed to the defendants (Coddingtons) who were at the time under heavy responsibility for R. & S. as indorsers of notes for their accommodation, payable at different times, but all subsequent to the delivery of the notes by R. & S. to the defendants (Coddingtons). When the notes on which the Coddingtons were indorsers for R. & S. fell due, they (Coddingtons) were obliged to take them up; the defendants denied all knowledge as to how the notes came into the hands of R. & S., and alleged that they believed that they were the *bona-fide* and exclusive property of R. & S., and that they received them with other notes as an indemnity, as far as they would avail, for their responsibilities. The question was, under the circumstances, were the defendants holders for value, and, as such, protected against the equities in favor of the plaintiff? In delivering the opinion, Chancellor Kent said:

"The notes were not negotiated to them in the usual course of "business or trade, nor in payment of any antecedent debt or an "existing one, nor for cash, or property advanced, debt created, "or responsibility incurred, on the strength and credit of the "notes. They were received from R. & S. after they had stopped "payment and had become insolvent within the knowledge "of the Coddingtons, and were seized upon by them as *tabula* "*manfrazio*, to secure themselves against contingent engage-"ments, previously made for R. & S., and upon which they had "not then become chargeable. There is no case that entitles "such a holder to the paper, in opposition to the title of the "true owner. They are not holders for a valuable considera-"tion within the meaning or policy of the law." And continuing, he says: "It is the credit given to the paper, and the "consideration *bona fide* paid on receiving it, that entitles the "holder to such extraordinary protection, even in cases of the "most palpable fraud. It is a necessity of a general rule of "law, and ought not to be carried beyond the necessity which "creates it."

[1] 5 John's Chan. 54.

On appeal to the Court of Errors and Appeals, the judgment of the Chancellor was affirmed. Now, it will be seen, from the extract I have quoted from the opinion of the Chancellor, that as the notes were not negotiated in payment of an antecedent debt, or an existing one, property advanced, debt created or responsibility incurred, etc., they were not holders for value. But, on appeal, some members of the Court, and among them the Chief Justice, undertook to say that a pre-existing debt was not a valuable consideration for the purpose of protecting a *bona-fide holder* without notice. The Chief Justice said transferring negotiable paper in absolute payment of an antecedent debt was not in the usual course of business, and that the debt must be created at the time. Now, this point seems not to have been in the case at all, and, therefore, not necessary for decision.

There is reason to believe that Chancellor Kent afterward came to another conclusion; for subsequently to writing his opinion in *Coddington* v. *Bay*, he added to his Commentaries, vol. 3, p. 81, note R., the following: "Mr. Justice Story, in "his work on Promissory Notes, page 215, note 1, repeats and "sustains the decision in *Swift* v. *Tyson*, 16 Peters 1–22, and "I am inclined to concur in that decision as the better and "plainer doctrine." And in reference to this, Mr. Justice Harlan says, in delivering the opinion in the Supreme Court of the United States in the *Railroad Co.* v. *National Bank*:[1] "Of course it did not escape the attention of Chancellor Kent "that the Court, in *Swift* v. *Tyson*, declared the equities of the "prior parties to be shut out as well when the note was merely "pledged as collateral security for a pre-existing debt as when "transferred in payment of or extinguishment of such debt." And in *Rosa* v. *Brotherton*[2] the Court decided positively that taking negotiable paper in absolute payment of a pre-existing debt will not free it from equities existing between the original parties. This case was decided on the authority of *Coddington* v. *Bay* alone. The Court said: "It follows from the princi- "ple of this case (referring to *Coddington* v. *Bay*) that the "holder of a note, negotiable on its face, who receives it in "payment of a pre-existing debt, or responsibility incurred, "takes it subject to all the equities between the original par-

[1] 102 U. S. 14–25.
[2] 10 Wendall 86.

"ties. In the language of the commercial law, he *has not paid* "*value* for it, and therefore is in no better condition than the "payee. The plaintiff gave no value for the note. He loses "nothing if the defendant succeeds in his defence. He gave "nothing for the note, advanced nothing, nor incurred any "responsibility upon its credit. He has no equity superior to "that of the maker, and in such case the law leaves him in "possession who already has it."[1]

This reasoning is illogical, for has he not given up his debt on the strength of the paper? And, in fact, in this case at least, lost his debt? For it appears that he could have recovered had he proceeded instead of taking the paper; and yet it is contended that he has given up nothing, and is in no worse position than he was in at first.

The Supreme Court of that State again decided in *Wardell* v. *Howell*[2] that receiving a note as collateral security for the payment of a pre-existing debt is not in the usual course of trade, and will not free it of the equities existing between the maker and indorser, though in this case it was an accommodation note made for a particular purpose, and, having been diverted from that purpose, did not free it from equities.[3]

The case of *Coddington* v. *Bay* has been much weakened if not entirely overruled by some of the later cases in the Supreme Court of New York.[4] In the *Bank of Salem* v. *Babcock*, where a note was indorsed and transferred in payment of an old debt, the securities for which having been cancelled, the Court held that there was a sufficient consideration, and precluded all defences as between the original parties.

And so in *Bank of Sandusky* v. *Seaville*,[5] it was held that where a bank discounts a note to *extinguish* a debt due to it

[1] But see *Smith v. Van Loen*, 16 Wend. 659, where the Court took occasion to explain the case of *Rosa* v. *Brotherton*, and by reference to the original papers it was found to be of that character, that the plaintiff could not have recovered without any such rule. See, also, *Bank* v. *Worthington*, 12 Wend. 600.

[2] 9 Wendall 171.

[3] *Woodhill* v. *Holmes*, 10 John's Chan. 231; *Skelding* v. *Warren*, 13 John's Chan. 270; *Brower* v. *Taber*, 5 Wend. 566; *Vallett* v. *Parker*, 6 Wend. 615.

[4] *Bank of Salem* v. *Babcock*, 21 Wend. 499; *Bank of Sandusky* v. *Seaville*, 24 Wend. 115.

[5] 24 Wend. 115.

from the holder, or where the proceeds are applied toward the discharge of his liability, such acts are equivalent to *paying value at the time,* and constitute the Bank a holder for valuable consideration. And in *Mohawk Bank* v. *Corey*,[1] the Court overruled the defence, that the note was transferred for a pre-existing debt, because the plaintiff not only took the note in payment, but gave up the old securities; though it seems that the Supreme Court holds that this is only applicable to notes transferred as security, and not as payment.[2]

In *Francea* v. *Joseph*[3] it was held that where a promissory note is handed to a person for discount, and he hypothecates it with his creditors for a pre-existing debt of his own, the party taking it cannot retain it against the owner, although he was ignorant of the way in which it was obtained; and though he grants forbearance on the original debt, as was done in this case, it was held he cannot hold against the true owner.[4]

The case of *Stalker* v. *McDonald*[5] came up for decision in the Supreme Court of New York soon after the case of *Swift* v. *Tyson* was decided by the Supreme Court of the United States, and strong efforts were made to induce the Court to overrule their decision in *Coddington* v. *Bay*, and to conform to the ruling laid down in *Swift* v. *Tyson*. But after a careful reviewing of the authorities on the question, both English and American, Chancellor Walworth said that he was unable to come to the conclusion that the settled law of that State was so manifestly wrong as to authorize the Court to overturn its former decision for the purpose of conforming it to that of any other tribunal whose decisions are not of paramount authority. But they hold that if the note is indorsed, *without recourse*, in payment of a pre-existing debt which is at the time discharged, the holder of it is a *bona-fide* holder for value, and not subject to any equities between the original parties.[6] And so, one taking in exchange a note not then due, which is surrendered,

[1] 1 Hill Ry. 512.

[2] *Manhattan Co.* v. *Reynolds*, 2 Hill 140.

[3] 3 Edward Chan. 182.

[4] See *Wardell* v. *Howell*, 9 Wend. 170.

[5] 6 Hill 93.

[6] *Bank* v. *Gilleland*, 23 Wend. 311; *Bank* v. *Scoville*, 24 Wend. 115; *Youngs* v. *Lee*, 12 N. Y. 551; *White* v. *Bank*, 4 Sandf. 222.

is considered a holder for value.[1] But it seems that the old note must be surrendered absolutely before maturity.[2]

From an examination of the cases in that State, the conclusion which must be drawn from them is, that one taking paper in absolute payment of a pre-existing debt is a holder for value; while he is not such a holder if he takes it in conditional payment; and it seems that generally when paper is spoken of as being received in payment of a debt, it is meant that it is received in conditional payment. But this distinction does not seem to be a very sound one; for when paper is taken in conditional payment of an existing debt, if an agreement is not necessarily implied to forbear the collection of the existing debt until the maturity of the new paper, does not the condition that the debt shall revive, if the new paper be not collected, amount to the same thing?

In Pennsylvania, the Courts have held that taking negotiable paper in payment of a pre-existing debt frees it from equities between the original parties, Judge Bell saying, in *Kirkpatrick* v. *Murhead*:[3] "Whatever contrariety of opinion may have "existed elsewhere, on this subject, it is the undoubted law of "Pennsylvania that though the holder of a negotiable instru- "ment received in payment of a pre-existing debt, before ma- "turity, cannot be subjected to equities which might have fur- "nished a defence as between the original parties and of which "he had no notice."

But they also hold that, if the paper is taken merely as *collateral* security for the payment of a debt previously contracted, the defendant may aver any ground of defence which would have been a good defence between the antecedent parties to the bill or note.[4]

In *Petrie* v. *Clark*,[5] one of the earliest cases in Pennsylvania, the note upon which suit was brought was indorsed in blank by the defendant to the executors of one Rodgers, deceased, for goods purchased from them, which were part of the assets, and

[1] *Youngs* v. *Lee*, 12 N. Y. 551.

[2] *Bright* v. *Judson*, 47 Barb. 29. See Bigelow on Bills and Notes, 499.

[3] 16 Pa. 117–123. See, also, *Bardsley* v. *Delp*, 88 Pa. 420.

[4] *Petrie* v. *Clark*, 11 S. & R. 377; *Dejean* v. *Waddington*, 6 Whar. 220; *Appleton* v. *Donaldson*, 3 Pa. 381; *Oakford* v. *Johnson*, 2 Miles 203; *Jackson* v. *Polack*, 2 Miles 362; *Royer* v. *Keystone Bank*, 4 W. N. C. 86,

[5] *Supra*.

the note itself was, consequently, assets in their hands. The executor, who had this note in possession, was indebted to the plaintiff on his own promissory note to nearly the same amount, and, after his note had become due, made an arrangement with the plaintiff by which it was taken up, and a new note, at five months, substituted in its stead, and the note in suit was handed over, with the blank indorsement of the payee, as collateral security for the payment of this debt, the other executors not being a party to the transaction, and the plaintiff being ignorant of the circumstances under which the note in suit came into the hands of the executors.

The question before the Court was, whether or not the plaintiff was a *bona-fide* holder for a valuable consideration. Now, if the note had been given in absolute discharge of the debt, there is no doubt but that he would be an innocent holder for a valuable consideration, and, as such, entitled to protection; and also, according to the decisions in Pennsylvania, if the note had been given as a pledge for money advanced, at the time of transfer, in the absence of fraud or collusion, he would be entitled to protection. "But," said Judge Gibson, "as it appears "on the bill of exceptions that it was given in pledge for se- "curing an antecedent debt, which was not discharged, but "suffered to remain, and as it does not appear that money was "advanced, or any act done that would in law be a present "consideration, the case as presented was against the plaintiff." The record of this case does not show that it was contended that there was an extension of time given to the executor by the plaintiff in consideration of the note left as collateral security, yet the facts of the case seem to indicate plainly that such was the object, for the record says that the executor was indebted to the plaintiff on a note to about the same amount as the note in question, and that the note had arrived at maturity, and that an arrangement was entered into by which the old note was taken up, and a note given, payable in five months, instead, providing the note in suit was left with him as collateral security for the payment of the debt.

No one, I think, will doubt that this was an extension of time to the executor on the faith of the security; for he gained five months' time by the transaction, and the plaintiff is certainly in a worse position than he was in at the time of this agreement. Had he pushed for the money on the old note when

due, the indications were that he could have recovered; and as the securities were decided to be unavailable to him, he is certainly placed in a much worse position than he occupied before the agreement.

And, again, in *Dejean* v. *Waddington*,[1] in an action of assumpit upon a promissory note, drawn by the defendant Dejean, in favor of Robinson & Smith or order, and by them indorsed to the plaintiff Waddington, the plaintiff lent Robinson & Smith fifteen hundred dollars on a note, and, as collateral security, the latter firm placed in the hands of Waddington a bond for twenty-three hundred dollars of a certain Edward Miller to Thomas S. Smith, of the firm of Robinson & Smith. Some time afterward Robinson called on the plaintiff and stated that he wanted to take the bond away to get it discounted. Robinson & Smith, a week or so after the delivery of the bond, paid to Waddington eight hundred dollars, and transferred the note to them as collateral security for the amount yet remaining due. The plaintiff gave up his claim on the bond for the note and the eight hundred dollars. It seems that the note of Robinson & Smith to plaintiff was protested, and that one of the firm came to the plaintiff, and stated that if he would loan him the bond for a day, he would get the money on it, and then pay the fifteen hundred dollars. The bond was delivered to him for that purpose, but was never redelivered to the plaintiff, nor was the amount due on the note paid according to the understanding between them, but some time afterward eight hundred dollars in cash were paid, and the note in suit transferred to the plaintiff in lieu of the bond and as collateral security for the note. Judge Rodgers, in his opinion, says: "But although this is so, it has been repeatedly held "that a collateral security for a pre-existing debt, without more, "is not such a consideration as will give title to the holder; "yet if there is any new and distinct consideration, the holder "is a purchaser for value, and, as such, protected from a de- "fence which would have availed between the original parties. "It seems to me there would be no great difficulty in proving "that it would have been better not to have restrained the ne- "gotiability of paper *bona fide* pledged as a collateral security "for a debt, but on this point the law is settled. But where

[1] 6 Wharton 220.

"there is a new consideration, as where it can be shown that "time was given in consideration of obtaining the note as a "security for the debt, it would be otherwise." As there was here an exchange of securities, the bond being of more value than the note, it constituted a valuable consideration, since it appears that if they had retained the bond they would have been secure, so that the exchange of securities made sufficient consideration.[1] But it was contended in this case that it was only the exchange of one *collateral* security for another collateral security. Supposing this to be true, if the bond was of more value than the note, as it undoubtedly was in this case, can it be said that he did not relinquish a right? In his opinion Judge Rodgers expresses regret that the law as to paper pledged as collateral security for an antecedent debt is as it is, but says that, as the law is settled, it must be followed, though the contrary doctrine could easily be shown to be better for the commercial world.

There are, in Pennsylvania, decisions on this point almost without number; but as they are to the same effect, it is sufficient for the present purposes to simply cite a few more.[2]

The Courts all agree that if any new consideration enters into the transaction—for example, an additional loan or advancement made at the time, or some new responsibility incurred, or a stipulation for delay or credit, or a change of securities, or the like—the holder is protected from the infirmities affecting the instrument before it was transferred.[3]

A surrendering of collaterals previously given, or affording increased indulgence as to time, is a sufficient consideration for an assignment of negotiable paper by way of collateral.[4]

It has been held that a note transferred to a judgment credi-

[1] See *Hornblower* v. *Prowd*, 1 B. & A. 233, where it was held that an exchange of securities constituted a good and valuable consideration.

[2] *Notter* v. *Shippen*, 2 Barr 358; *Appleton* v. *Donaldson*, 3 Barr 381; *Kilpatrick* v. *Murhead*, 4 Harris 117; *Sitgraves* v. *Bank*, 13 Wright 359; *Lenham* v. *Wilmarding*, 5 P. F. Smith 73; Ashton Appeal, 23 P. F. Smith 153; Pratt's Appeal, 27 P. F. Smith 378.

[3] *Dejean* v. *Waddington*, 6 Wharton 220; *Appleton* v. *Donaldson*, 3 Pa. St. 381; *Ruddick* v. *Lloyd*, 13 Iowa 441; *Nelson* v. *Edwards*, 40 Barb. N. Y. 479; *Traders' Bank* v. *Bradner*, 43 Barb. 379.

[4] *Goodman* v. *Simonds*, 20 Howard 342; *Bank* v. *Watson*, 42 N. Y. 490; *Brown* v. *Levitt*, 21 N. Y. 113; *White* v. *Bank*, 3 Sandf. 222.

tor as security for the payment of the judgment, and in consideration of his discontinuing proceedings supplementary to execution then pending against the debtor, was supported by a sufficient consideration.[1]

All authorities concur in holding that if there is any change in the legal rights of the parties in relation to the antecedent debt, the creditor taking the collateral is deemed to be a *bona-fide* holder for value, and therefore protected against prior equities.[2]

In the case of further time being granted to the creditor, although the real object in giving collateral security is to gain time for the payment of the debt, yet this purpose will not avail unless there is a definite agreement to delay.[3] The mere fact that the creditor, after having received the collateral security, does forbear to enforce his claim, or does grant indulgence, does not prove that such indulgence or forbearance was the consideration for the giving of the security. Forbearance without any definite agreement to forbear is a mere voluntary act, and not to be considered as a consideration for the giving of security.[4] The right to enforce the original debt is regarded as suspended when the creditor who takes collateral security expressly agrees to keep the original obligation until the collateral becomes due and is unpaid.[5] An agreement of that sort is, in effect, one not to enforce the original bill in the meantime; and such seems to be the effect when one receives a second bill in renewal of the first, for then creditors mutually undertake not to enforce the first.[6]

While holding to this rule, the Courts introduce an exception when the paper so taken is what is known as accommodation paper, and in all the States, with the exception of Maine, hold that one who takes such paper as security for a

[1] *Boyd* v. *Cummings*, 17 N. Y. 107.

[2] *Nagle* v. *Yuman*, 14 California 450, opinion of Field, C. J.

[3] *Atlantic National Bank* v. *Franklin*, 55 N. Y. 235; *Whitney* v. *Goin*, 20 N. H. 354; *Body* v. *Jenson*, 23 Wis. 402.

[4] *Fenoville* v. *Hamilton*, 35 Ala. 319; *Railroad Co.* v. *Barker*, 29 Pa. 160.

[5] *Gould* v. *Robson*, 8 East. 516.

[6] See *Kendrick* v. *Lomax*, 2 Crompt, J. 405.

prior debt, takes it freed from equities existing between the antecedent parties.[1]

In *Lord* v. *Ocean Bank*,[2] an action of assumpsit was brought by the Bank against Lord upon a promissory note made by Lord in favor of one Daniel Adee, and by him indorsed to the Bank as collateral security for a pre-existing debt of the payee (Adee). It was admitted that there was no consideration between Lord and Adee, and that it was a mere accommodation note. In deciding this case, Black, C. J., said: "The maker "of an accommodation note cannot set up the want of consid- "eration as a defence against it in the hands of a third person, "though it be taken as collateral security merely. He who "chooses to put himself in front of a negotiable instrument for "the benefit of his friend must abide the consequence, and has no "more right to complain if his friend accommodates himself by "pledging it for an old debt than if he had used it in any other "way. Accommodation paper is a loan of the maker's credit "without restriction as to the manner of its use." And so in *Appleton* v. *Donaldson*,[3] a case similar to *Lord* v. *Ocean Bank*, Rodgers, J., said: "We think that when a person gives another "an accommodation note, it contains an authority to use it in "the payment of an existing debt, to sell or discount it, or, if "more to his interest, to pledge it as a collateral security "for money advanced at the time or before advanced, or on a "running account between the parties, or for money advanced "at the time, before, or afterwards; in short, that he has the "complete control to use it, as the name imports, for his own "benefit or accommodation in any manner he may judge "best calculated to advance his own interest. If he can pre- "vent a suit against him by pledging the note intentionally "drawn in the usual commercial form, and intended to be used "without restriction, and by this means preserve his credit and "save himself from utter ruin, there is nothing I can see, either "in law or in morals, to prevent him. Of what consequence

[1] *Redbank* v. *Bank*, 5 Wend. 66; *Grander* v. *Leroy*, 2 Paige; *Lathrop* v. *Morris*, 5 Sanford 7; *Bank* v. *Corey*, 1 Hill, 513; *Appleton* v. *Donaldson*, 3 Pa. 386; *Lord* v. *Ocean Bank*, 20 Pa. 384; *Work* v. *Case*, 34 Pa. 138; *Struther* v. *Kendall*, 41 Pa. 214; *Cumming* v. *Boyd*, 83 Pa. 372; Ashton's Appeal, 73 Pa. 153; *Hutchinson* v. *Boggs*, 28 Pa. 294.

[2] *Supra.*

[3] 3 Pa. St. 386.

"is it to the maker whether he sells the note, gives it as a col-"lateral security for a debt already contracted, or for money "advanced at the time of the transaction? Accommodation "paper, I take it, is a loan of the credit of the maker to the "extent of the value of the note, for the benefit of the payee "without restriction."[1] And continuing, he says: "As far "as any legal question is concerned, it is of no sort of conse-"quence whether the note was taken as a collateral security for "an antecedent debt, or money advanced at the time the note "was received on pledge, as in either case the plaintiff is "entitled to recover, unless there is some other defence."[2]

The reason, then, it will be seen, that has induced the Courts of Pennsylvania, and of the other States so holding, to establish this rule as to accommodation paper, while they hold exactly the contrary as to other negotiable paper, is, that the paper was given for that purpose—*i.e.*, raising money on it—and he is equally raising money on it, whether he has it discounted and receives money for it, or uses it in payment of his debt, or, as in these cases, uses it as collateral security for a debt he is owing, thus enabling him, it may be, to continue in his business, for a period at least, or to induce his creditors to forbear pressing him. Therefore they do not base their decisions on the fact that the holder is a purchaser for a valuable consideration, but because accommodation paper is a loan of the maker's credit without restriction.[3] But if the accommodation paper was made to serve a particular purpose and it has been diverted from that purpose, or some other equity exists in favor of the maker, it is necessary that the holder should have parted with value on the faith of the note in order to cut off such equity of the maker. That is, he must have taken it in some other way than as collateral security for an antecedent debt.[4] Though if the holder of an accommodation note has parted with a consideration on the faith of it, the mere fact of

[1] See *Petrie* v. *Clark*, 11 S. & R. 239; *Dejean* v. *Waddington*, 6 Wharton 20.

[2] See *Work* v. *Kase*, 34 Pa. 138; *Struthers* v. *Kendall*, 41 Pa. 214.

[3] See *Dorman* v. *Insurance Co.*, 13 Leg. Intel. 77, opinion by Lowrie, C. J.; and *West* v. *Bank*, 15 Leg. Intel. 316; *Holmes* v. *Paul*, 5 Clark 461; *Trotter* v. *Shippen*, 2 Pa. St. 335; *Garrand* v. *Pittsburg & Connellsville R. R. Co.*, 29 Pa. St. 160; *Cumming* v. *Boyd*, 83 Pa. 377.

[4] *Moore* v. *Ryder*, 63 N. Y. 438; *Bank of Rutland* v. *Buck*, 5 Wend. 66; *Crandall* v. *Vicksey*, 43 Barb. 156.

its having been diverted from its purpose is not a defence to his action upon it. To constitute that a good defence, it must be shown that the holder had notice of its restricted qualities.[1] And so it necessarily follows that such paper can be impeached in the hands of the holder for fraud in its making or procurement.[2]

The other States of the Union seem to be about equally divided on the question, and therefore a short review of their decisions will suffice for all present purposes, taking up those first which hold to the ruling of Chancellor Kent.

In Alabama the decisions do not show that they rely upon good reasoning, in holding that one who takes commercial paper as collateral security for the payment of a pre-existing debt is not a purchaser for value, their doctrine being that, as the law is settled, they ought not to depart from the law as laid down.[3] Even where forbearance is granted, they hold the same rule;[4] but if the paper is taken in absolute payment, it is sufficient to constitute a good consideration.[5] And if the debt is created at the time of transfer, they hold him protected.[6]

In Arkansas, the mere taking of a negotiable instrument as collateral security for an antecedent debt is not such a consideration as to cut out equities between the antecedent parties; but if the paper is taken in absolute payment at the time of transfer, they hold it to be a sufficient consideration.[7]

The Courts of Iowa hold that a note transferred in satisfaction of an antecedent debt is transferred for a valuable consideration;[8] but they refuse to so decide when the paper is taken merely as collateral security for an antecedent debt, holding that such a transfer does not give the indorsee the rights of a holder for value.[9]

[1] *Merchants' Bank* v. *Comstock*, 33 N. Y. 24; *Maitland* v. *Citizens' Bank*, 40 Md. 540.

[2] *Cummings* v. *Boyd*, 83 Pa. 377.

[3] *Fenoville* v. *Hamilton*, 35 Ala. 319; *Boyer* v. *Beck*, 29 Ala. 703; *McKensie* v. *Bank*, 28 Ala. 606; *Anderson* v. *McCoy*, 8 Ala. 920; *Bank* v. *Hall*, 6 Ala. 639; *Cullum* v. *Bank*, 4 Ala. 21.

[4] *Bank* v. *Reid*, 70 Ala. 199; *Miller* v. *Boykins*, 70 Ala. 469.

[5] *Mayberry* v. *Morris*, 62 Ala. 113; *Bank* v. *Hase*, 6 Ala. 639.

[6] *Miller* v. *Boykins*, 70 Ala. 469; *Boykins* v. *Bank*, 72 Ala. 262.

[7] *Bertrand* v. *Barkman*, 13 Ark. 150.

[8] *Johnson* v. *Barry*, 1 Iowa 531.

[9] *Iowa College* v. *Hill*, 12 Iowa 462; *Ruddick* v. *Lloyd*, 13 Iowa 441; *Davis* v. *Strohm*, 17 Iowa 421; *Ryan* v. *Chew*, 13 Iowa 589.

In *Ruddick* v. *Lloyd*[1] the Court said: "The assignee of "negotiable paper receiving it in good faith from the payee "without notice, and before maturity, as collateral security for "a pre-existing debt due him by the payee, where no new "consideration, stipulation for delay, or credit be given, or "right parted with by the creditor, he is not a holder of the "collaterals for value, in the usual course of trade, and takes "it subject to all the equities which may exist against the "payee, in favor of the maker, at the time of the assignment." They hold that it is otherwise if he takes the note for value, as in consideration of a loan, or advancement, or in payment of the pre-existing debt, or on further time being granted to pay the original debt, or for a change of securities or the like.

In *Iowa College* v. *Hill*[2] there is a very interesting opinion by Judge Wright, in which he supports the rule, and reviews the authorities with considerable ability.

In Kentucky the Courts adhere to the rule laid down by Chancellor Kent,[3] though, if taken in absolute payment of the debt, the indorsee is protected.[4]

So also in the Maine,[5] in the case of *Brammell* v. *Becket*,[6] it was an accommodation note given for the purpose of raising money, which, by the law of Pennsylvania and most of the other States, shut out prior equities.[7] Judge Howard said, in deciding *Brammell* v. *Becket*, that "as he was a mere indorsee "of an accommodation note or bill anyhow, and having given no "consideration for it, and is one who does not therefore claim "through a party for value, he is not entitled to protection against "the equities of the accommodation maker, acceptor or indorsers; "in the language of Eyre, C. J. (1 Bos. & Pul. 650), 'he is in "'privity with the first holder, and will be affected by everything "'that would affect the first holder.'" Now, its being an accommodation note or bill would be the very essential thing that

[1] 13 Iowa 441.

[2] 12 Iowa 471.

[3] *Lee* v. *Smeed*, 1 Met. (Ken.) 628; *May* v. *Quinby*, 3 Bush. (Ken.) 96; *Breckenridge* v. *Moore*, 3 B. Mon. (Ken.) 629.

[4] *Alexander & Co.* v. *Springfield Bank*, 2 Met. 535.

[5] *Brammell* v. *Becket*, 31 Me. 205, but otherwise when taken in absolute payment; see *Holmes* v. *Smythe*, 16 Me. 177; *Morton* v. *Waite*, 20 Me. 175.

[6] *Supra.*

[7] *Lord* v. *Ocean Bank*, 20 Pa. 384.

would entitle the holder to protection in Pennsylvania; or, to use the words of Black, C. J., "If one gets into the front of a "negotiable instrument, for the benefit of his friend, he cannot "be heard to complain if his friend oblige himself by pledging "the paper for a debt of his own." In other words, it is held that an accommodation note is a loan of the maker's or indorser's credit for the value of the note without restriction as to the manner of its use.

In Minnesota they seem to follow the New York rule, though it is not very clear,[1] and also in Mississippi,[2] though the contrary rule seems to have been laid down in *Harrison* v. *Pike & Co.*,[3] but that case seems to have been decided on the law of Louisiana, as the transaction took place there. If the indorsee has collected the securities and placed the amount to the credit of the debtor, he is considered a *bona-fide* holder.[4]

In New Hampshire it is held that where a negotiable note is indorsed *bona fide*, before it is due, without any notice of any defence existing against it, the transfer is as valid, perfect and effectual, as if it had been received in payment for goods sold, or in the course of any other commercial dealing.[5] On the other hand, when a note is transferred in pledge merely, as a collateral security, the general property remains in the indorser; the indorsee takes it as he would a chose in action not negotiable, and subject to any defence that might be made to it in the hands of an indorsee arising prior to the time when notice is given of the indorsement.[6]

In *Williams* v. *Little*, Parker, C. J., argued that, in the first case (*i.e.*, in payment), by taking in payment of a precedent debt he has parted with a right, because he cannot, after such payment and discharge, maintain an action upon the debt he has thus discharged; and in the second case, he says it is an indorsement in pledge merely. The general property still remains in the payee; if it is collected, it will pay so

[1] *Beeker* v. *Sandusky Bank*, 1 Minn. 310.

[2] *Brooks* v. *Whetson*, 7 S. & M. Miss. 513; *Harrison* v. *Pike & Co.*, 48 Miss. 57; *Bank* v. *Lewes*, 13 S. & M. 226.

[3] *Supra.*

[4] *Bank* v. *Lewes*, *supra.*

[5] *Williams* v. *Little*, 11 N. H. 66; *Goss* v. *Emerson*, 3 Foster 428; *Bank of Woodstock* v. *Kent*, 13 N. H. 581.

[6] *Williams* v. *Little*, *supra*; *Jenness* v. *Bean*, 10 N. H. 267; *Bank* v. *Kent*, 13 N. H. 581; *Fletcher* v. *Chase*, 16 N. H. 39.

much of his debt to the plaintiff; if not, the debt still remains, and the loss is his loss and not that of the indorsee; the indorsee has only a special property in the note, the general property remaining in the payee. True it is that the debt still remains, and he still can have an action upon it. But is he situated as he was before? The payee of the note now being insolvent, can it be said that his position is not worse than before? His forbearance to sue, in this case, cost him the debt, and it is said that the debt still remains, and that he has action upon it. It certainly does remain; but of what avail is it now that the payee is insolvent? It seems that a negotiable note in the hands of an indorsee who has taken it as collateral security for a debt contracted at the time of transfer is subject to the same defences to which it would have been subject in the hands of the indorser who pledged it.[1]

In Ohio the point came up very prominently in the case of *Roxborough* v. *Messick et al.*,[2] and it was held there by the Court, Justice Shaw delivering the opinion, that when the note of a third person is transferred *bona fide*, before maturity, as collateral security, and for value, as in consideration of a loan or advancement, or a stipulation expressed or implied, for further time to pay a pre-existing debt, or a further credit, or a change of securities for a pre-existing debt, or the like, the assignee of such collateral would be protected from infirmities affecting the instrument before it was transferred.

They also hold that when a debt is created, without any stipulation for further security, and the debtor, without any obligation to do so, voluntarily transfers a negotiable instrument to secure the pre-existing debt, and both parties are left, in respect to the pre-existing debt, *in statu quo*, without incurring any new responsibility, parting with any right, or subjecting himself to any loss or delay, the holder has not taken the note in the usual course of trade and for value, and is subject to the defences as between the original parties to the paper.[3]

This case was before the Superior Court of Ohio,[4] where it was decided by that Court, in a very able opinion, that the in-

[1] *Rice* v. *Raitt*, 17 New Hamp. 116; *Fletcher* v. *Case*, 16 New Hamp. 39.

[2] 6 Ohio State 448.

[3] *Roxborough* v. *Messick*, 6 Ohio St. 454.

[4] 1 Handy Reports 348.

dorsee of a bill of exchange or promissory note, received in good faith, before maturity, as collateral security for an existing debt, is protected from all the equities of the maker, or acceptor, of which he had no notice at the time of transfer.

Before the ruling in the case of *Swift* v. *Tyson*,[1] the Supreme Court of Ohio had held to the rule laid down in *Coddington* v. *Bay*;[2] & [3] but after the decision in *Swift* v. *Tyson* the same Court reviewed their former decisions, especially *Riley* v. *Johnson*,[4] and used the following language: "It is believed that the "law, as thus settled by the highest judicial tribunal in the "country, will become the uniform rule of all, as it is now of "most of the States, and, in a country like ours, where so much "communication and interchange exist between the different "members of the confederacy, to preserve uniformity in the "great principles of commercial law, is of much interest to the "commercial world."[5]

This was again admitted to be the correct ruling in *Gordon* v. *Kearney*,[6] the Court remarking that they did not perceive any difference in principle between an advance of money and a balance suffered to remain on the faith of mutual dealing. In the one case as in the other, credit is given upon the faith of the paper deposited.

These decisions were afterward overruled by the case of *Roxborough* v. *Messick et al.*, and the ruling in that case is believed to be the law at the present day.

In *Wormley* v. *Lourey*,[7] Justice Green said: "Where one "receives a note for a pre-existing debt, he parts with nothing. "He is in the same position after a successful defence by the "maker that he was before he took the note." "He is in the "same position"—how can that be made to appear? He has allowed the collection of his debt or its security to cease for the time being; and is not this often fatal in such matters? And has he not incurred the trouble and expense of litigation? Truly, then, can it be said that he is in the same situation? In one

[1] 16 Peters 1.

[2] 20 Johns 637. [3] *Riley* v. *Johnson*, 8 Ohio 526.

[4] *Supra.*

[5] *Carlisle* v. *Wishart*, 11 Ohio 172.

[6] 17 Ohio 375.

[7] 1 Humphrey (Tenn.) 468. See, also, *Ingham* v. *Vadeau*, 3 Hump. 51; and, contra, see 10 Yerger 304.

respect, at least, he is—his debt is still unpaid, and he is again out of court.

In *King* v. *Doolittle*[1] it was decided that the transfer of negotiable paper in payment of, or as collateral security for, a pre-existing debt is not a transfer in the due course of business, so as to free it from the antecedent equities, though it appears from the Judge's opinion that the case was decided that way, more because it was the law of Pennsylvania, where the contract of indorsement was made, than because of his own convictions.[2]

In Virginia the question may be considered as unsettled. In *Davis* v. *Miller*,[3] Judge Moncure refers to the case of *Prentise* v. *Zane*[4] as the only one in that State bearing upon the subject; and this case seems to have been based upon the supposed correctness of the New York rule. Judge Moncure, referring to the last-mentioned case, said: "The note in that case was "made in Philadelphia, and the decision conformed to the well-"settled law of the place of the contract. Whether the case "would have been decided the same way if the note had been "a Virginia contract is uncertain."

In Wisconsin it is settled that taking negotiable paper as security for antecedent indebtedness is not in the usual course of business, and for that reason is not protected from prior equities;[5] though in the case of *Cook* v. *Helins*[6] the Judge based his decision on the ruling laid down in *Stalker* v. *McDonald*.[7] If the negotiable paper is taken in absolute payment of the debt,[8] or if previous securities are surrendered,[9] this is held to be a valuable consideration.

This about completes the list of the States in which the ruling in *Coddington* v. *Bay* is upheld; and it will now be neces-

[1] 1 Head (Tenn.) 88.

[2] See also the following cases: *Vamoyet* v. *Sorwell*, 3 Hump. 192; *Ware* v. *Children*, 6 Hump. 443; *Nichols* v. *Bates*, 10 Yerger 429; *Napier* v. *Elaw*, 6 Yerger 108.

[3] 14 Gratton 1.

[4] 2 Gratton 1.

[5] *Bowman* v. *VanKeuren*, 29 Wis. 209; *Body* v. *Junsen*, 33 Wis. 402; *Jenkins* v. *Schwab*, 14 Wis. 1; *Stevens* v. *Campbell*, 13 Wis. 375; *Shufeldt* v. *Fease*, 16 Wis. 660.

[6] 5 Wis. 107.

[7] 6 Hill 93.

[8] *Atchinson* v. *Davidson*, 2 Pinney 48; *Rice* v. *Cutter*, 17 Wisconsin 21; *Kellogg* v. *Faucher*, 23 Wis. 21.

[9] *Knox* v. *Clifford*, 38 Wisconsin 657.

sary to consider briefly those States in which the opposite rule is recognized.

From an examination of the decisions of the several States just mentioned, it will be seen that Courts seem to lay great stress on the law as laid down by the Courts of Pennsylvania and New York, and seem to think as the law on this question in those States is as it is that they ought to follow it, thus showing that they have great respect for the decisions of our State and of our sister State. Now, if we have several of the States of the Union relying upon us for good law upon a question of such grave importance as this, we should strive to lay down a principle that will be of the greatest possible benefit to the necessities of business life, and not to lead them blindfold into a doctrine which is, at best, only plausible.

Before proceeding to consider the decisions in the other States it may be well to state just what objections the Courts of States holding to the doctrine of *Coddington* v. *Bay* have for not following the rule laid down by that distinguished jurist, Judge Story.

The objections that they usually urge are :

First.—That taking negotiable paper as security for an antecedent debt is not in the usual course of business.

Second.—That upon the transfer of negotiable paper merely as collateral security for an antecedent debt, nothing is surrendered by the indorsee ; that to permit the equities between prior parties to prevail, deprives him of no right or advantage enjoyed at the time of transfer ; imposes upon him no additional burdens, and subjects him to no additional inconveniences.

As to the first objection, I do not believe that it is sustained by the usages of the commercial world. The transfer of the negotiable paper as security for antecedent debts constitutes a material and prominent portion of the commerce of a country. Such transactions have become very frequent in financial circles. They have of necessity grown out of business transactions, and, in this advanced age of commercial activity, they are largely to the benefit of both debtor and creditor.

This being so, can it be said, then, that such a transaction is not in the known course of business or trade ?

Mr. Parsons, in his work on Promisory Notes and Bills of Exchange, treats the question of the transfer of negotiable

paper under three heads, one of which is where the paper is transferred or received as collateral security for antecedent debts. In reference to this he says "that, when the principles of the "*law merchant* have established more firmly and unreservedly "their control and their protection over the instrument of the "merchant, all of these transfers (not affected by peculiar cir- "cumstances) will be held to be regular and to rest on a valua- "ble consideration." [1]

It has now become a common thing to present notes to a bank to be discounted, and offer other notes as security for them, and, when the notes given as security for them become due, to renew them; and I cannot see what valid objection can be made to this transaction, or any good ground for holding that the bank shall be open to all defences against the note they have taken as security, and yet not open to the defences against the note which they discount.

I do not think that the Courts could decide that this is an improper use of negotiable paper without injuring its usefulness, and thereby placing a stumbling-block in the way of mercantile transactions.

As to the second objection, it may be true in some cases, but, I think, in very few. For can it be said in the great bulk of such transactions, where a note is indorsed and given either in payment of, or as a security for, an antecedent debt, that the note then given can be withdrawn or annulled, at the same time leaving the party so taking it in as secure a position as he was before? Of course he still holds his claim against the transferrer, but can it be said that he is not in a more disadvantageous position than he otherwise would have been?

In a great number of cases the transfer is the result of a bargain by which the debtor gains either some delay or forbearance, or the giving up by the transferree of some means of collecting his debt at the time of transfer.

The learned author, in the work last mentioned, again says "that it would be one thing to hold that an indorser of nego- "tiable paper, who can surrender it and still be in all respects "as well situated as if he had not taken the paper, should be "open to the defences available against his indorser. But it "would be another thing, and very different thing, to hold that

[1] Parsons on Notes and Bills, 221.

"all indorsers for an antecedent debt or for collateral security "are in the same position." [1]

Few cases have, it is presumed, arisen in which the interest of the debtor is not the main thing to be benefited; so that if the rule should be confined to that class of cases falling within the abstract theory of such a defence, the question would cease to be of much importance, nor would it often be true that if the title of the holder were impeached he could be said to be in as good a position as before.

In California the Courts accept the ruling in *Swift* v. *Tyson* without expressing much of an opinion on the subject, though, in *Robinson* v. *Smith*, [2] Judge Baldwin said: "A man receiving "such security, and suspending proceedings to collect his debt, "would very often find that he had lost his debt by taking the "security, if defences could be set up against the paper. In "older communities, where a different rule obtains, it has been "argued with more force than it could be here that, merely from "receiving an additional security for a debt and surrendering "nothing, the creditor cannot be considered a *bona-fide* pur- "chaser for value, since he neither gives nor loses anything in "the transaction. The general workings of the rule, as we "have held it here, would be beneficial, and this is as much as "can be said of any proposition of commercial law; and it "has, besides, the great advantage attributed to it by Chancel- "lor Kent [3] of being the 'plainer rule.'" [4]

In Connecticut, beginning with *Brush* v. *Scribner*, [5] the Courts of that State have adhered to the rule stringently. They recognize no distinction between taking negotiable paper in payment of an antecedent debt and taking it as security for such. [6]

In Delaware it is held that where a negotiable note is taken in payment for an existing debt, it is founded on good consideration, and that neither fraud nor want of consideration as between the original parties can be set up as a defence against

[1] Parsons on Notes and Bills, page 220.

[2] 14 California 99.

[3] 3 Kent Comm. 81, note B.

[4] See also *Payne* v. *Beusly*, 8 Cal. 260; *Naylor* v. *Lyman*, 14 Cal. 450.

[5] 11 Conn. 388.

[6] *Bank* v. *Bates*, 8 Conn. 507; *Bank* v. *Welsh*, 29 Conn. 473; *Roberts* v. *Hall*, 37 Conn. 205; *Oswego* v. *Bank*, 30 Conn. 27.

the indorsee.[1] I have been unable to find a reported case in Delaware in which negotiable paper was taken merely as collateral security for an antecedent debt, and hence infer that such a case has never been before the Courts of that State; so that it is safe to say, with reference to Delaware, that the question is unsettled.

In Georgia the same rule has been followed. Beginning with the first case on the subject, *Bond* v. *Central Bank*, it has been held to the proper ruling ever since.[2]

In *Bond* v. *Bank* the point did not, however, come directly before the Court, that case being decided on the ground that the paper was taken in payment of the debt; but it was soon after settled in *Gibson* v. *Connor*[3] that there was no difference between taking paper in payment of, and as collateral security for, an antecedent debt. In *Meadow* v. *Bird*[4] two of the Justices dissented, and filed very strong dissenting opinions.

So, also, in Illinois, beginning with *Hancock* v. *Hodgson*,[5] the Supreme Court of that State has adhered to the rule.[6] In *Manning* v. *McClure* Mr. Justice Lawrence reviews the decisions very elaborately, and in the course of his argument says: "What "inducement has the debtor to part with his negotiable paper "except the expectation of further forbearance? Would he "think of parting with it, if he expected his creditor would "immediately bring suit against him, notwithstanding the in- "dorsement? When the creditor seeks his delinquent debtor, "is not his language in substance, 'I must bring suit unless "'you secure me;' and when the debtor has turned over his "collateral, without taking an express promise or agreement to "forbear, does not good faith, nevertheless, require forbearance? "And is it not generally given among right-minded men? "Having received the securities, the creditor believes himself "safe. He is lulled into quiet and neglects to take such steps

[1] *Bush* v. *Peckard*, 3 Harrington 388; *Corbil* v. *Bank of Smyrna*, 2 Harr. 236.

[2] 2 Georgia 106; *Gibson* v. *Connor*, 3 Georgia 47; *Meadow* v. *Bird*, 22 Ga. 246.

[3] *Supra*.

[4] *Supra*.

[5] 4 Scan. 329.

[6] *Mayo* v. *Moore*, 21 Ill. 428; *Manning* v. *McClure*, 36 Ill. 490; *Butter* v. *Hanghout*, 42 Ill. 18; *Bowman* v. *Millison*, 58 Ill. 36; *Doolittle* v. *Cook*, 73 Ill. 354.

"to procure the payment of his debt as prudence would have "required, but for the fancied securities in his hands." And it also may be stated that in *Butter* v. *Hanghout*[1] the Court of this State decided that this rule applied also to chattels transferred as security for an antecedent debt.

The Supreme Court of Indiana holds to the same opinion.[2] So do the Courts of Louisiana[3] and Maryland.[4]

In reviewing the authorities in *Maitland* v. *Bank*, the Court said: "Apply the principle just stated before us" (referring to *Swift* v. *Tyson*), "and there can be no doubt of the sufficiency of "the consideration for the transfer of the note to the plaintiff, "whether it was as collateral security for a pre-existing debt "or a contemporaneous debt, or to secure future discounts or "advances, or all combined. In either case, the consideration "would be valuable in the sense of the rule which protects the "holder of negotiable paper, and the plaintiffs would be entitled "to the full benefit of the security, unless *mala fides* or notice "of such facts as will impeach its title to the note be shown."

In Massachusetts they have some admirable decisions sustaining this doctrine.[5] In *Blanchard* v. *Stevens*,[6] Judge Dewey, in a very able opinion, in which he goes very carefully over the ground, said: "If the party had not received the note as col- "lateral security, he might have pursued other remedies to en- "force the security or payment of the debt. He might have "obtained other securities or perhaps payment in money. It "is a fallacy to say that if the plaintiffs are defeated in their "attempt to enforce the payment of these notes, by allowing "this defence to prevail, yet, nevertheless, they are in as good "a situation as they would have been in if the notes had not "been transferred to them. That fact is assumed and not "proved, and, from the very nature of the case, is a matter of "entire uncertainty. The convenience and safety of those "dealing in negotiable paper seem to require and justify the

[1] 42 Ill. 18.

[2] *In re Wiley* v. *Bissell*, 171; *Valette* v. *Mason*, 1 Ind. 288.

[3] *Geovanovuk* v. *Bank*, 26 La. 15; Succession of Dolbid, 21 La. 3; *Bank* v. *Garemd*, 21 La. 555; *Smith* v. *Frain*, 23 La. 434.

[4] *Cecil Bank* v. *Heald*, 25 Md. 563; *Maitland* v. *Bank*, 40 Md. 540.

[5] *Blanchard* v. *Stevens*, 3 Cush. 162; *Bank* v. *Chapin*, 8 Met. 40; *Culver* v. *Benedict*, 13 Gray 7; *Stoddart* v. *Kimball*, 6 Cush.; *Jewell* v. *Warren*, 12 Mass. 300; *Fisher* v. *Fisher*, 98 Mass. 302; *LeBreton* v. *Pierie*, 2 Allen 8.

[6] *Supra*.

"rule that when a person takes a negotiable note not overdue, "or apparently dishonored and without notice, actual or con- "structive, of the want of consideration, or other defences "thereto, whether in payment for a precedent debt or as col- "lateral security for a debt, the holder should have the legal "right to enforce the same against the parties thereto, not- "withstanding such a defence might have been good and "effectual as between the original parties."

The same rule is also upheld in Michigan,[1] though both of these authorities refer rather to taking the paper in payment of than as security for an antecedent debt.

In Missouri the decisions have not been as uniform as in some of the other States mentioned. In the first important case on the subject, *Goodman* v. *Simonds*,[2] it was held that taking negotiable paper as collateral security for a pre-existing debt, without more, would not free it from antecedent equities. This case afterward went to the Supreme Court of the United States, where the decision of the State Court was reversed.[3] Again, in *Brainard* v. *Reeves*,[4] the Supreme Court of Missouri followed the rule they had previously laid down in *Goodman* v. *Simonds*, though in that case the Court said that had the paper been transferred in absolute payment of the debt, it would not have been liable to the equities between the original parties. In the cases of *Grant* v. *Redwell*[5] and *Boatman's Saving Institution* v. *Holland*,[6] the Court decided that taking negotiable paper as collateral security for an antecedent debt, freed the paper from pre-existing equities—likewise in the later case of *Davis* v. *Carson*.[7] Hence I think it may be said that the question is unsettled in Missouri.

In New Jersey the law was laid down by Chief Justice Green, in *Allaire* v. *Hartshorne*,[8] with great ability, and has been adhered to ever since.

In North Carolina the question seems never to have come

[1] *Bostwick* v. *Dodge*, 1 Dougl. 413; *Outhwaite* v. *Porter*, 13 Mich. 583.
[2] 19 Missouri 106.
[3] 20 Howard 343.
[4] 2 Missouri Appeal Cases 492.
[5] 30 Mo. 457.
[6] 38 Mo. 50.
[7] 69 Mo. 607.
[8] 1 Zabriskie 655.

squarely before the Court,[1] though all distinction between taking in payment and as collateral security seems to be repudiated.

In Rhode Island the rule was very forcibly laid down by Judge Bosworth, in *Bank of Republic* v. *Carrington*,[2] in the decision of which case he says, after criticising the opposing authorities: "The indorsing over of a note for the purpose of "paying a debt ought to be held as much for valuable con- "sideration as the transferring it for a new purchase, and the "indorsing over of such a note for securing a debt heretofore "contracted as for one presently incurred. It is held by the "Courts, with scarcely an exception, that the transferring of a "note to secure payment for a present purchase is in the usual "course of business. And why is it not so when transferred to "secure a debt due, and which ought to be paid or secured be- "fore new liabilities are contracted? On the ground o impor- "tance for commercial purposes, we do not see why negotiable "instruments should not have credit and currency for the pay- "ment of or securing debts, as well as for the purchasing of "goods, or the raising of cash. It is often quite as impor- "tant to business men, in commercial transactions, that they "should be able to pay or secure their debts, and make use of "current paper for those purposes, as it is that they should "make new purchases, or sell such paper sometimes at ruinous "sacrifices for the purpose of raising money with which to pay "their debts."

In South Carolina the same ruling is made.[3]

In Vermont the rule was maintained with remarkable force by the very able and eminent Judge Redfield, in the case of *Atkinson* v. *Brooks*,[4] wherein he reviews the decisions of the English and American Courts with great ingenuity and sound reasoning. In the course of his opinion he says: "He certainly "does forego the pursuit of his own debt, and thus certainly "puts himself in a different and, in law, a worse situation, and "this must be regarded as, *prima facie*, a foregoing of some "advantage by the indorsee, and also an accommodation to "the indorser, who may fairly be presumed to prefer this mode

[1] *Reddick* v. *Jones*, 6 Iredell 107.

[2] 5 Rhode Island 523. See, also, *Colt* v. *Doyle*, 7 Rhode Island 550.

[3] *Bank of Charleston* v. *Chamber*, 11 Rich. 657.

[4] 26 Vermont 569.

"of meeting his debt. The transaction, therefore, possesses "both the cardinal ingredients which constitute the text-book "definition of a valuable consideration; it is a detriment to "the promisee, and an advantage to the promisor. And it "is no satisfactory answer to the case to say the party who "takes such bill or note, which proves unproductive, is in the "same position as he was before.

"This is by no means certain; he has, for the time, foregone "the collection of his debt, and, in such matters, time is the "essence of the transaction, and the debtor thereby gains time "—it may be more or less—but, of necessity, some time is "gained, and, in such matters, this is always accounted an "advantage, and is often of the most vital consequence to the "debtor. How, then, can it fairly be said that this mere sus-"pension of debt, during the currency of the note or bill, is no "consideration? It seems to me such reasoning upon other "subjects—indeed upon any subject where one is not pressed "to the wall by the necessities of his case—would almost be "regarded as frivolous; surely it is scarcely specious."

And again, in the same case, he says: "According to the gen-"eral commercial usage, there is, then, no essential difference in "principle whether a current note or bill is taken in payment "or as collateral security for a prior debt, provided the note is "in both cases truly and unqualifiedly negotiated so as to impose "upon the holder the obligation to conform to the general "rules of the *law merchant* in enforcing payment. If, indeed, "the note or bill is not so negotiated as to make the holder a "party to it or so as to require of him to pursue the strict "rules of mercantile usage in making demand of payment, "and giving notice of dishonor, so as to charge his indorser "with all the prior parties upon the peril of making the note "or bill his own, in payment of his debt, then he could not be "regarded probably as having so taken the paper in the due "course of business *bona fide* and for value as to shut out "equitable defences existing between the original parties. "But ordinarily we suppose it fair to conclude that one who "takes a note or bill negotiated to him while current, although "merely as collateral to a prior debt, is expected to pursue the "same course in enforcing payment as if he paid money for "the bill. And it is scarcely supposable that one so taking "security for a debt will not conduct differently on account of

"the security. It is of necessity that he should, if he puts "any confidence in the ultimate availability, and one would "scarcely part with such security unless he expected more or "less indulgence by or on account of it. And when the prior "debt is suffered to remain uncollected, it is, under the circum- "stances, fair to conclude such was the stipulation. And the "case of one who takes a note or bill so negotiated, whether "in payment or security for a prior debt, implicitly stipulating "to forego the collection until maturity of the collateral paper, "when such paper proves unproductive, is the same in both "alternatives."

Here it will be seen that Judge Redfield rests his argument on the ground that there is an implied agreement by the creditor to suspend his remedies during that period, and that this implied agreement constitutes the true consideration for the taking and holding of the collateral paper.[1]

And this is probably the most plausible theory of all for working out this doctrine in relation to such transactions. It is admitted that if the indorsee gives time on his original debt, he is protected. But it is contended that, if he does not *expressly* agree to give time, he in *fact* does not give any. Now, this is a question of presumptions, and the presumption must be drawn from experience in such matters. To say that such is not the real object of the transaction is, it seems to me, at variance with the general experience of men whose business necessarily makes them familiar with such arrangements.

This decision has been followed by many others in that State; but it is sufficient to mention a few others.[2]

This about completes the review of those States whose Courts hold to the opinion in *Swift* v. *Tyson*, except, perhaps, some few minor States which, in a general view, it is not important to consider.

[1] See *Manning* v. *McClure*, 36 Ill. 490, where the same position is taken by Judge Lawrence, who says it is ordinarily fair to presume that although there may not have been an express agreement to forbear, yet it is necessarily implied from the nature of the transaction and the object which the parties had in view. See, also, *Currie* v. *Misa*, L. R., 10 Exchequer 153–163.

[2] *Dixon* v. *Dixon*, 31 Vermont 450; *Russell* v. *Spater*, 47 Vt. 273; *Quin* v. *Hard*, 43 Vt. 375. But see *Austin* v. *Curtis*, 31 Vt. 67, opinion by Bennett, J.

It may be well to state that the transaction is governed by the law of the place where the pledge is made. Thus, if a broker in New York, to whom negotiable securities are intrusted upon which to raise money for the owner, deliver them as security for a pre-existing debt of his own in Massachusetts, or any other State, by the law of which the receiving of a negotiable note as security for a pre-existing debt shuts out all equities between the original parties, the transfer must be dealt with according to the law of Massachusetts, or any other State in which the pledge may be made; and the pledgee, taking such securities in good faith before maturity, obtains a good title to them to the amount pledged.[1] But if a negotiable note be delivered in New York as security for an antecedent debt, the transaction is governed by the law of that State, and in a suit upon such note in another State, where the rule is that one taking paper as security for a precedent debt is a holder for value, in the usual course of business, the law of New York, that such transfer does not constitute one a holder for value, must be applied.[2]

It might also be stated, in completing the review upon this subject, that when lands or chattels are pledged as security for an antecedent debt, they do not follow the general ruling as to negotiable paper, and one who takes them as such will take such title subject to all the equities between the original parties, and will not be a purchaser for value.[3]

It will be seen from the consideration of this question in the several State Courts that they are divided into two classes, as to their ruling on this question: one class holding that an antecedent debt does constitute a consideration sufficient to support a transfer of negotiable paper as security, and the other denying such a conclusion.

Text-writers everywhere, in treating of this subject, say that such a debt *does* constitute a valuable consideration; and, it seems to me, it is impossible to maintain to the contrary, unless the debt is not due, or the new security is of that nature that no trust can be reposed in it. These cases are, of course, very rare. In almost every case, the creditor *will proceed* differently

[1] *Culver* v. *Benedict*, 13 Gray 7.

[2] *Russell* v. *Buck*, 14 Vt. 147.

[3] 2 Leading Cases in Equity, 3d Ed. 104; *Straugham* v. *Fairchild*, 80 Md. 598; *Bank* v. *Bates*, 120 U. S. 556.

on the faith of the new security than if no such security were given; and this will naturally delay the collection of his debt until he realizes upon the new security; and then if that is taken away from him, it is impossible to put him in his former position, and, as in several of the cases cited, he has virtually lost his debt by being lulled into inaction on the strength of the new security, and with only a very remote possibility of ever recovering at all upon the original debt.

Such a condition of affairs will, it is manifest, work great injustice, even more so than in the past, as the commerce of our nation is increasing with great rapidity. As such transactions have grown out of the necessities of trade and business, so they will continue to increase with the increasing population and prosperity of our country.

Consequently, it is to be hoped that before many years our State Courts will adopt the better and, it seems to me, the more sensible views of the English and of our Federal Courts upon this question, and not expend so much time and labor in trying to determine and explain the precise difference between taking a note or bill "on account of," "in payment of," "as collateral to" or "as security for" an existing debt.

No one whose mind is not accustomed to drawing such hair-breadth distinctions would ever contend for a moment that it made any essential difference in the legal rights of the creditor whether he took the paper as security for an existing debt, or as payment of such debt. In either case he ought to have the full benefit of all the securities until he has obtained full satisfaction of his debt.

To be consistent, we must either accept the New York rule, that in both cases there is no value given for the note or bill, or else insist that value is given in both cases.

A negotiable instrument is, in effect, a contract made by the obligor or promisor to pay any and every man who shall take the instrument on the faith of his word and give value for it; and from this it follows that, whenever the instrument is transferred, a new contract arises; and such paper, passing as it does by delivery, is treated as a species of money which the necessities of trade require, and therefore render current, and is subject to the same rules as the money it represents.

The law relating to collateral security given for loans of money, discounts of bills of exchange, promissory notes and

other valuable securities, has become a recognized branch of commercial jurisprudence; and as such transactions are not confined to a single locality, but extend throughout the civilized world, uniformity of decision is a matter of great public convenience and universal necessity.

Stern and inflexible rules are necessary to give full confidence to those who deal in such securities, so that if such an instrument be made without consideration, or have any other infirmity, the holder taking without knowledge of such facts will be protected.

And about all that is necessary to bring about such a result is the concurrence of a few more of the State Courts, and especially the Courts of Pennsylvania and New York.

Supreme Court of Pennsylvania.

COMMONWEALTH v. McMANUS.

SYLLABUS.

The defendant was tried for murder.

Held, per MITCHELL, J.: That the jury are not judges of the law in any case, civil or criminal.

The determination of the law is no part of their duty or their right.

STATEMENT OF THE CASE.

Appeal from the Court of Oyer and Terminer of Philadelphia County.

On a trial for murder in the first degree, the counsel for the prisoner asked the Judge to charge: "The jury are judges of the law as well as of the facts, and may, upon the whole case, determine the grade of the offence."

The Judge answered this point by saying, "that the jury had been sworn to decide the case on the law and evidence; that the statement of the law by the Court was the best evidence of the law within the jury's reach, and that, therefore, in view of that evidence, and viewing it merely as evidence only, the jury was to be guided by what the Court had said with reference to the law."

The Supreme Court affirmed this answer of the learned Judge as "an accurate and carefully considered answer to the